

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)

ITC^DELTACOM, INC. )

DOCKET NO. 04-0280

For Consent to the Indirect )  
Transfer of Control of Business )  
Telecom, Inc., dba BTI, and )  
ITC^DeltaCom Communications, Inc., )  
dba ITC^DeltaCom. )

DECISION AND ORDER NO. 21471

DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

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Filed Nov. 24, 2004

At 1 o'clock P.M.

Broder K. Kane  
Chief Clerk of the Commission

*for*

ATTEST: A True Copy  
KAREN HIGASHI

*for* Chief Clerk, Public Utilities  
Commission, State of Hawaii.

Broder K. Kane

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DECISION AND ORDER

I.

Introduction

ITC^DELTACOM, INC. ("ITCD"), on behalf of BUSINESS TELECOM, INC., dba BTI ("BTI") and ITC^DELTACOM COMMUNICATIONS, INC., dba ITC^DELTACOM ("DeltaCom") (collectively, "Applicants") jointly request commission approval of the indirect transfer of control of ITCD and its operating subsidiaries, BTI and DeltaCom and the proposed reorganization of ITCD whereby DeltaCom becomes a wholly-owned, first-tiered subsidiary rather than a second-tiered subsidiary of ITCD ("Proposed Transactions").<sup>1</sup>

Applicants served the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY ("Consumer Advocate") copies of the Application. The Consumer Advocate, by its Statement of Position, filed on October 29, 2004, indicates that it does not

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<sup>1</sup>Applicants' application, filed on September 24, 2004 ("Application").

object to the approval of the Proposed Transactions, described above, subject to certain qualifications.

## II.

### Background

#### A.

##### Description of Applicants and Related Entities

ITCD through its three (3) operating subsidiaries, BTI, DeltaCom, and Interstate FiberNet, Inc. ("IFN") provides integrated communications services. ITCD delivers various voice and data communications services including local exchange, long distance, enhanced data, Internet, and collocation and managed services. ITCD offers these services primarily over its own network facilities and also utilizes leased network facilities to extend its market coverage.

BTI is a North Carolina corporation that is presently authorized to provide intrastate telecommunications services in the State of Hawaii ("State" or "Hawaii") on a resold basis.<sup>2</sup> DeltaCom is an Alabama corporation and a wholly-owned subsidiary of IFN. IFN, a provider of wholesale fiber optic transmission, is wholly-owned by ITCD, DeltaCom's ultimate parent holding company.<sup>3</sup>

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<sup>2</sup>Decision and Order No. 16358, filed on June 2, 1998, in Docket No. 98-0143. See also, Decision and Order No. 20839, filed on August 22, 2003, in Docket No. 03-0200; and Decision and Order No. 20859, filed on March 22, 2004, in Docket No. 04-0032.

<sup>3</sup>Decision and Order No. 20859, filed on March 22, 2004, in Docket No. 04-0032. The commission also takes official notice, pursuant to Hawaii Administrative Rules ("HAR") § 6-61-48, of any other commission records relating to Applicants and their related entities.

DeltaCom is presently authorized to provide telecommunications services in all fifty (50) states including Hawaii.<sup>4</sup>

WELSH, CARSON, ANDERSON, & STONE VIII, L.P., WCAS CAPITAL PARTNERS III, L.P. and WCAS INFORMATION PARTNERS (collectively, "Welsh Carson") is a private equity investment firm with managerial and financial expertise in numerous fields, including telecommunications. Presently, Welsh Carson holds more than fifty per cent (50%) of the outstanding common stock of ITCD. Accordingly, both DeltaCom and BTI are indirectly controlled by Welsh Carson.<sup>5</sup>

B.

Description of Proposed Transactions

Pursuant to a series of related transactions, ITCD proposes to issue new shares of ITCD common stock, which will reduce the ownership interest of ITCD's current majority shareholder, Welsh Carson, to below fifty per cent (50%). The consummation of this transaction will ultimately result in the transfer of control of ITCD, as well as the indirect transfer of control of BTI and DeltaCom from Welsh Carson to the shareholders of ITCD. ITCD also proposes to reorganize its ownership in DeltaCom whereby DeltaComm will be a wholly-owned first-tiered

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<sup>4</sup>DeltaCom is authorized to provide intrastate telecommunications services in the State on a resold basis. Decision and Order No. 16931, filed on April 6, 1999, in Docket No. 98-0408.

<sup>5</sup>See, Decision and Order No. 20389, filed on August 22, 2003, in Docket No. 03-0200.

subsidiary of ITCD rather than a second-tiered subsidiary. Applicants represent, among other things, that the Proposed Transactions (1) will "promote competition in the local exchange, interexchange, and international telecommunications markets, and will serve the public interest[;]" and (2) will be "seamless to consumers." Applicants, therefore, contend that "there are no potential public interest harms raised by the [Proposed Transactions] and there will be clear benefits to the public upon approval and closing of [these transactions]."

C.

Consumer Advocate's Position

The Consumer Advocate acknowledges that based on its review of the Annual Reports of Resellers and Various Telecommunications Services filed with the commission, DeltaCom and BTI are non-dominant telecommunications carriers in Hawaii. Furthermore, the Consumer Advocate recognizes "the entry of many telecommunications service providers in the Hawaii market serves to mitigate any traditional public utility regulatory concerns regarding the proposed transfer of control and reorganization affecting DeltaCom and BTI." Therefore, if there are any adverse consequences from the [Proposed Transactions], "Hawaii's consumers of Applicants' telecommunications services will have the option of selecting another service provider."

Based on the above, the Consumer Advocate does not object to commission approval of the Proposed Transactions. However, the Consumer Advocate recommends that Applicants should be directed to

submit copies of the following documents within thirty (30) days of the issuance of this decision and order:

1. The instrument defining the terms of ITCD's new common stock issuance, pursuant to HAR § 6-61-101(b)(2);
2. The plan of reorganization to document DeltaCom becoming a wholly-owned, first-tiered subsidiary of ITCD, pursuant to HAR § 6-61-105(c)(2); and
3. The debt refinancing documents required by the commission in Decision and Order No. 20859, filed on March 22, 2004, in Docket No. 04-0032.

### III.

#### Discussion

Hawaii Revised Statutes ("HRS") § 269-7(a) authorizes the commission to examine the condition of each public utility, its financial transactions, and "all matters of every nature affecting the relations and transactions between it and the public or persons or corporations." Thus, the commission has jurisdiction to review the proposed financial transactions of the parent entity of a regulated public utility under HRS § 269-7(a). Under this section, the commission will approve a proposed financial transaction if it is reasonable and consistent with the public interest.<sup>6</sup>

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<sup>6</sup>See, Decision and Order No. 19874, filed on December 13, 2002, in Docket No. 02-0345.

HRS § 269-16.9(e) also permits us to waive regulatory requirements applicable to telecommunications providers if we determine that competition will serve the same purpose as public interest regulation. Similarly, HAR § 6-80-135 permits us to waive the applicability of any of the provisions of HRS chapter 269 or any rule (except provisions of HRS § 269-34 or provisions of HAR chapter 6-80 that implement HRS § 269-34), upon a determination that a waiver is in the public interest.

Upon review of the record in this docket, we find the following: (1) that much of the telecommunications services currently provided by BTI and DeltaCom are competitive; (2) that BTI and DeltaCom are non-dominant carriers in Hawaii; (3) that the Proposed Transactions are consistent with the public interest; and (4) that competition, in this instance, will serve the same purpose as public interest regulation.

Based on the foregoing, the commission will waive the requirements of HRS § 269-7(a), to the extent applicable, pursuant to HRS § 269-16.9(e) and HAR § 6-80-135.7. Nonetheless, we will adopt the Consumer Advocate's recommendations, in their entirety, by requiring Applicants to submit copies of the documents, described in II.C. above to the commission and the Consumer Advocate within thirty (30) days of the date of this decision and order. If necessary and in accordance with HAR § 6-61-50, any

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<sup>7</sup>At the same time, the commission will continue to examine a utility's application on a case-by-case basis to determine whether the applicable requirements of HRS § 269-7(a) or any other related provision governing utility transactions, should be waived. The commission's waiver in this decision and order shall not be

party in this docket may file a stipulation for protective order for commission review and approval to protect the confidentiality of information that is protected from disclosure under HRS chapter 92F, or any other law. The record also indicates that DeltaCom is delinquent in its annual telecommunications relay service ("TRS") contribution for the period July 1, 2004 to June 30, 2005, established pursuant to: (1) Act 50, Session Laws of Hawaii 2003; and (2) Order No. 21049, filed on June 10, 2004, in Docket No. 04-0070. Accordingly, we will also require DeltaCom to pay its annual TRS contribution to the Hawaii TRS Administrator, NECA Services, Inc. within thirty (30) days of the date of this decision and order.

#### IV.

##### Orders

##### THE COMMISSION ORDERS:

1. The requirements of HRS § 269-7(a), to the extent applicable, are waived with respect to the Proposed Transactions described in the instant Application, filed on September 12, 2004.

2. Within thirty (30) days of the date of this decision and order, Applicant shall submit to the commission and the Consumer Advocate copies of the documents, described in Section II.C. herein. If necessary and in accordance with HAR § 6-61-50, any party in this docket may file a stipulation for protective order for commission review and approval to protect the

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construed by any utility as a basis for not filing an application involving similar transactions or circumstances.



confidentiality of information that is protected from disclosure under HRS chapter 92F, or any other law.

3. Within thirty (30) days from the date of this decision and order, DeltaCom shall pay its annual TRS contribution for the period July 1, 2004 to June 30, 2005 to the Hawaii TRS Administrator, NECA Services, Inc. Written proof of payment shall be sent to the commission.

4. Applicants shall conform to all of the commission's orders set forth above. Failure to adhere to the commission's orders shall constitute cause to void this decision and order, and may result in further regulatory actions, as authorized by law.

DONE at Honolulu, Hawaii NOV 24 2004.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By Wayne H. Kimura  
Wayne H. Kimura, Commissioner

APPROVED AS TO FORM:

Kris N. Nakagawa  
Kris N. Nakagawa  
Commission Counsel  
04-0280.ac

By Janet E. Kawelo  
Janet E. Kawelo, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 21471 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

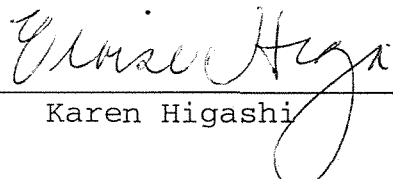
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DATED: NOV 24 2004

  
for Karen Higashi